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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Petitioner-Appellant

For an Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRI WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT APPEALED FROM, AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to United States Supreme Court Rule 12, Paragraph 1, Banque de France, the above named appellant, presents this, its statement showing the basis on which

said appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Judicial Code, Section 237, amended (Section 344 of Title 28 of the United States Code Annotated), which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court on a writ of error.

II. The statute of the State, the validity of which is involved, is Section 224 of the General Corporation Law of the State of New York (Section 224, L. 1909, ch. 28), which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

III. The judgment sought to be reviewed is dated March 5th, 1942, and appellant's petition for appeal was presented to and allowed by Hon. Irving Lehman, the Chief Judge of the Court of Appeals of the State of New York, on the 7th day of March, 1942.

IV. Banque de France claims that under Article 1, Section 8, Clause 3 of the Constitution of the United States, it is immune from suit in the courts of the State of New York, because it is a foreign corporation incorporated under the laws of France, which does not maintain any office or place of business, or transact any business in the

State of New York, and that the courts of the State of New York are without jurisdiction of an action upon a contract which was made and to be performed in France, and which is wholly unrelated to the State of New York.

Banque de France further claims that insofar as Section 224 of the General Corporation Law of the State of New York purports to give to the courts of the State of New York the power to entertain or exercise jurisdiction of such action, it is unconstitutional and void.

The validity of Section 224 of the General Corporation Law of the State of New York has been upheld in this proceeding by the Court of Appeals of the State of New York, said court being the highest court of the State of New York (Opinion, Lehman, Ch. J. annexed).

V. The questions presented upon this appeal are as follows:

(1) Do the provisions of Article 1, Section 8, Clause 3 of the United States Constitution render unconstitutional and void the provisions of Section 224 of the General Corporation Law of the State of New York, as applied to an action which arose outside the State of New York, upon a contract made and to be performed in France, which is wholly unrelated to the State of New York, between two corporations engaged in interstate and foreign commerce which do not maintain any office or place of business, or transact any business in the State of New York?

(2) Are the principles of immunity under the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3), as applied in *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284; *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492; *Ball* v. *Canadian Pacific Steamships, Ltd.*, 276 N.

Y. 650, and *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379, (certiorari denied 298 U. S. 675) applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?

(3) Are the principles of immunity under the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3), as applied in *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284; *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492; *Ball* v. *Canadian Pacific Steamships, Ltd.*, 276 N. Y. 650, and *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379 (certiorari denied 298 U. S. 675) applicable only in favor of a foreign corporation defendant engaged in interstate and foreign commerce, otherwise entitled to such immunity, in a situation wherein there is another forum, apart from the local forum, available equally to both parties to the litigation?

VI. The facts upon which this case is founded, and the grounds upon which it is contended by appellant that the questions involved herein are substantial, are as follows:

Banque de France is a foreign banking corporation, and is the central bank of issue of France. It is also a commercial bank engaged in interstate and foreign commerce throughout the world. Between November 1939 and May 1940, Banque Nationale de Belgique, the central bank of issue of Belgium, delivered to Banque de France, at Paris, France, for safekeeping, certain cases said to contain gold of the value of in excess of two hundred and twenty-eight million dollars. In February 1940 a written contract, stating the obligations of the parties regarding the safekeep-

ing of the said cases said to contain gold, having been prepared in France, was forwarded to Brussels, Belgium, for signature, where it was signed. Said contract was then delivered to Banque de France, at Paris, France. Said cases, alleged to contain gold, were in the custody or control of Banque de France at the time of the German invasion, and for reasons which it is not here important to discuss, have not been redelivered to Banque Nationale de Belgique.

On March 14th, 1941, a single exiled director of Banque Nationale de Belgique, acting at London, England, purported to assign to Messrs. Daniel de Gorter and Henri Wild, residents of the State of New York, the claim of Banque Nationale de Belgique against Banque de France, arising out of the alleged breach of contract and conversion of said gold in France. On April 23rd, 1941, said alleged assignees instituted an action in the Supreme Court of the State of New York to recover $228,294,283.54 by levy of an attachment upon gold, the property of Banque de France, deposited in the Federal Reserve Bank of New York, valued at seven hundred and forty-nine million dollars. Service of the summons in said action upon Banque de France was effected by publication.

Banque de France, appearing specially, moved to dismiss the complaint in said action on the ground, among others, that to subject Banque de France to the necessity of defending the action in the courts of the State of New York would impose upon the defendant, a foreign corporation engaged in interstate and foreign commerce, an undue and unreasonable burden, in violation of the Constitution of the United States, and particularly of Article 1, Section 8, Clause 3 thereof. The Supreme Court of the State of New York denied said motion on August 8th, 1941,

with an opinion by Mr. Justice Benvenga, in which he held that the immunity from suit of non-resident corporations engaged in interstate or foreign commerce does not apply to foreign banking corporations "at least not to foreign banking corporations which, like those here involved, are not commercial banks, but central banks of issue", and that even assuming that Banque de France is engaged in foreign commerce, the prosecution of the action in the courts of the State of New York would not impose upon it a burden so heavy and so unnecessary as to be oppressive and unreasonable within the meaning of the Constitutional provision.

Appellant appealed from the decision of Mr. Justice Benvenga to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, and the latter Court affirmed the order of the lower Court denying appellant's motion to dismiss the complaint. Appellant then applied to the said Appellate Division of the Supreme Court of the State of New York for permission to appeal to the Court of Appeals of the State of New York, which application was denied.

Banque de France has not answered, or appeared generally, in said action.

On November 3rd, 1941, appellant, following the procedure approved by this Court in *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284, instituted this Special Proceeding in the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, for an Order of Restraint, pursuant to the provisions of Article 78 of the Civil Practice Act of the State of New York, and Sections 1295 and 1300 thereof, directing the Supreme Court of the State of New York and Hon. Felix C. Benvenga, individually and as one of the Justices of said Court, and Daniel de Gorter and Henri Wild, as

Assignees of Banque Nationale de Belgique, to desist and refrain from taking any further proceedings in the action hereinabove mentioned, and restraining the Supreme Court of the State of New York and Hon. Felix C. Benvenga, individually and as one of the Justices thereof, from entertaining or exercising jurisdiction in said action, upon the ground that the exercise of jurisdiction therein was without, or in excess of, the jurisdiction of said Supreme Court of the State of New York and said Hon. Felix C. Benvenga, as one of the Justices thereof, because of the provisions of Article 1, Section 8, Clause 3 of the Constitution of the United States.

On November 10th, 1941, the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, sustained a demurrer to the said petition and dismissed the petition "as matter of law and not in the exercise of discretion." Upon appeal to the Court of Appeals of the State of New York, the said Court being the highest Court in the State of New York, on March 5th, 1942, affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, with an opinion by Hon. Irving Lehman, Chief Judge of said Court, wherein the said Court of Appeals of the State of New York unanimously held valid and constitutional the provisions of Section 224 of the General Corporation Law of the State of New York (Laws 1909, ch. 28, Section 224).

It is the aforesaid judgment of the Court of Appeals of the State of New York from which appellant seeks to appeal to the Supreme Court of the United States, and which the appellant contends that the Supreme Court of the United States has jurisdiction to review.

VII. The cases upon which appellant relies to sustain the jurisdiction of the Supreme Court of the United States

to review the said judgment of the Court of Appeals of the State of New York are the following: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1.

The precise questions here presented have never been passed upon by the Supreme Court of the United States, as they are questions of first impression. Concededly, immunity from suit under the so-called "Commerce Clause" of the Constitution has heretofore been applied in litigations involving only corporate common carrier defendants. It is the contention of appellant, however, that such immunity applies equally to all engaged in interstate or foreign commerce, and that such immunity from suit in a jurisdiction foreign to the place of business of the corporate defendant and to the place where the cause of action arose in favor of a non-resident plaintiff, upon a contract made and to be performed in a foreign jurisdiction, is not confined to defendants who are engaged in transportation as common carriers. Appellant also contends that the nature of the function in interstate and foreign commerce performed by the corporate defendant is not the decisive factor in determining the existence of such immunity, but that such decisive factor is to be found in the fact that the corporate defendant is engaged exclusively in interstate or foreign commerce, and that, therefore, the defense of a suit against it in a foreign forum necessarily places an undue burden upon commerce.

From the opinion of the Court of Appeals in this case, it is not entirely clear that the refusal to apply the immunity in the case at bar is grounded upon the fact that the defendant, a foreign banking corporation, is not a common carrier engaged in the business of transportation of persons or things in interstate or foreign commerce.

In this regard the opinion of Chief Judge Lehman says:

> "At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis* v. *Farmers Cooperative Equity Co.*, 262 U. S. 312, 316). The principle upon which the petitioner relies is general; yet when that principle is invoked to support the contention that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts 'a serious and unreasonable burden' upon the corporation, a burden which unduly obstructs interstate commerce."

The really determining factor against the granting of immunity in the case at bar, which seems to have been adopted in the decision of the Court of Appeals of the State of New York, is that in the litigation at bar the facts fail to prove that "the suit might more conveniently be litigated in another forum available equally to both parties."

Appellant respectfully submits that this is not the true test as laid down by the decisions of the Supreme Court of the United States in the cases hereinabove set forth, and that if the principle thus stated to be controlling by the Court of Appeals of the State of New York is to be accepted as such, it should be so established by an authoritative decision of the Supreme Court of the United States.

VIII. There is appended hereto a copy of the opinion delivered by Mr. Justice Benvenga, one of the Justices of the Supreme Court of the State of New York, to which this Special Proceeding is ancillary, entitled "Daniel de Gorter and Henri Wild, as Assignees of Banque Nationale

de Belgique, plaintiffs, against Banque de France, defendant", affirmed 262 A. D. 997.

There is also appended hereto a copy of the opinion herein delivered by Hon. Irving Lehman, Chief Judge of the Court of Appeals of the State of New York, dated March 5th 1942.

Respectfully submitted,

FREDERIC R. COUDERT,
Attorney for Appellant.

COUDERT BROTHERS,
Of Counsel.

Leave to file the foregoing statement as to jurisdiction is hereby granted this 24th day of March, 1942.

IRVING LEHMAN,
Chief Judge, Court of Appeals.

APPENDIX "A".

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART I.

DANIEL DE GORTER and HENRI WILD, Assignees of Banque National de Belgique, *Plaintiffs*,

against

BANQUE DE FRANCE, Defendant.

Filed Aug. 9, 1941, New York County Clerk's Office.

BENVENGA, *J.*:

Motion for judgment dismissing the complaint herein, on the ground that the courts of this state are without jurisdiction of the person of the defendant and of the subject-matter of the action.

The action is for breach of contract and conversion, brought by residents of New York, assignees of the Banque Nationale de Belgique, a foreign banking corporation, against the Banque de France, also a foreign banking corporation.

It is alleged that between November, 1939 and May, 1940, immediately after the outbreak of the European War, the Banque de Belgique delivered gold of the value of more than $228,000,000 to the Banque de France for safekeeping, on the understanding that the Banque de France would, on demand, return the gold to the Banque de Belgique; that in June, 1940, just before the armistice between France and Germany, the Banque de Belgique demanded the return of the gold and it was refused.

It is not disputed that, as a rule, the general jurisdiction of the courts of this state extends to transitory causes of action of the nature here involved (Gregonis *v.* Coal & Iron Co., 235 N. Y. 152, 158-159; McCauley *v.* Georgia Bank, 239 N. Y. 514; Matter of Baltimore Mail S. S. Co. *v.* Fawcett, 269 N. Y. 379, 385), it is contended, however, that this court lacks jurisdiction of the subject matter, because in

the contract sued upon, the parties have expressly agreed to the exclusive jurisdiction of the courts of France.

Whatever the effect of such a stipulation may be in other jurisdictions, it is wholly ineffectual here. An agreement by which parties to a contract undertake to oust the courts or tribunals of this state of jurisdiction over controversies between the parties thereafter arising out of the contract and to confer exclusive jurisdiction to determine such controversies upon a foreign tribunal, is against public policy, null and void. (Sudbury *v.* Ambi, 213 App. Div. 98, 102-103; Sliosberg *v.* Ins. Co., 217 App. Div. 685, 688-689; Parker *v.* Krauss Co., 157 Misc. 667, 669; Aff'd. 249 App. Div. 718).

It is also contended that this court lacks jurisdiction of the person of the defendant, because the exercise of jurisdiction would conflict with the commerce clause of the Federal Constitution (U. S. Const., Art. 1, Sec. 8, Cl. 3), in that it would cast an undue and unreasonable burden upon interstate and foreign commerce.

Under this clause, nonresident corporations engaged in interstate or foreign commerce have been held not subject to suit, unless the cause of action grew out of business transacted within the territory of the forum (Guerin Mills *v.* Barrett, 254 N. Y. 380, 385; Brood *v.* Aluminum Co., 231 App. Div. 693, 698). But this rule, concededly, has been applied only to common carriers directly engaged in the transportation of persons or things in interstate commerce; it has never been applied to interstate or foreign corporations engaged in the banking business. Nor can the rule be so applied; at least, not to foreign banking corporations which, like those here involved, are not commercial banks, but central banks of issue, it seems that such banks customarily carry with other central banks, particularly at important financial centers, substantial amounts of gold and credit balances in order to discharge debts and credits arising out of relations between themselves. Their activities are highly specialized and limited. They are not engaged in foreign commerce within the meaning of the constitutional provision. At all events, such relationship as their activities may have to foreign commerce is but indirect and incidental. Accordingly, even assuming that the Banque de France is

engaged in foreign commerce, the prosecution of the action in the courts of this state would not impose upon it "a burden so heavy and so unnecessary as to be oppressive and unreasonable" within the meaning of the constitutional provision. "Such a suit may be a burden, but oppressive and unreasonable it is not" (International Milling Co. *v.* Columbia Transportation Co., 292 U. S. 511, 519, 520).

The motion is denied.

Dated, August 8th, 1941.

F. C. B. *J. S. C.*

APPENDIX "B".

In the Matter of the Application of BANQUE DE FRANCE, *Appellant,*

against

THE SUPREME COURT OF THE STATE OF NEW YORK, et al., *Respondents.*

(Decided March 5, 1942.)

Appeal by petitioner from the unanimous order of the Appellate Division, first department, dismissing as a matter of law a petition to restrain a judge from hearing the cause. Constitutional question involved.

Mahlon B. Doing and Frederic R. Coudert for appellant.

John Foster Dulles, Robert E. Houston, Jr. and MacDonald Deming for Daniel de Gorter et al., respondents.

LEHMAN, *Ch. J.:*

Banque de France is a corporation organized and existing under the laws of France. In France it conducts its business as the central bank of issue of France and as a commercial bank. Such business as it transacts here is purely incidental to its business in France, but in the course of that business it customarily maintains large bank balances here. Daniel de Gorter and Henri Wild are residents of the State of New York. Claiming that Banque

National de Belgique, a corporation organized and existing under the laws of Belgium, has a good cause of action against Banque de France for breach of contract and that Banque National de Belgique has assigned its cause of action to them, they obtained a warrant of attachment against the property here of Banque de France and levied upon the accounts and property of the Banque de France held by Federal Reserve Bank in New York. After a summons was served by publication upon Banque de France, it appeared specially in order to challenge the jurisdiction of the courts of the State of New York in the action which the assignees of Banque National de Belgique seek to maintain in this state. Its challenge was rejected in the Supreme Court and the order was affirmed by the Appellate Division, which denied leave to appeal to this court. After Banque de France had thus unsuccessfully sought by every available means to induce the court in which the action was brought to refuse to exercise jurisdiction and to dismiss the complaint, it applied to the Appellate Division, pursuant to the provisions of article 78 of the Civil Practice Act, for an order prohibiting and restraining the Supreme Court or any justice of the court from entertaining or exercising jurisdiction of the action.

The Appellate Division, upon motion of the respondents, dismissed the petition of Banque de France "as matter of law and not in the exercise of discretion". The petitioner seeks an extraordinary remedy to halt threatened action by a court or judge which the petitioner contends would be a usurpation of power. The General Corporation Law (Cons. Laws, ch. 23) provides that "an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action." (Sec. 224.) Transitory causes of action arising outside of the state are within the general jurisdiction of the courts of the state when brought by a resident of the state even though the defendant be a foreign corporation and the plaintiff be the assignee of a person not himself a resident of the state. There are nevertheless limitations upon the general jurisdiction of the courts of this state imposed by the Constitution of the United States.

A state may not encroach upon the field where the power of the federal government is exclusive and "the general jurisdiction of the courts of a state is confined to the field from which the state itself is not excluded." (*Matter of Baltimore Mail S. S. Co. v. Fawcett,* 269 N. Y. 379, 385.) In that case this court held that in circumstances where compulsion by a state upon a foreign corporation, engaged in foreign or interstate commerce, to submit a suit in its courts upon a transitory cause of action arising in a different jursdiction would constitute an unreasonable burden and an obstruction of commerce forbidden by the Constitution of the United States, the carrier may be entitled to an order prohibiting the State court from attempting to exercise jurisdiction of the suit. The Banque de France asserts that on that ground it is entitled to such an order for the necessary protection of its constitutional rights.

In all the cases where it has been held that such compulsion is beyond the power of a state and a violation of rights or immunities guaranteed by the Constitution, the foreign corporation has been engaged in commerce as a carrier. The Banque de France asserts that the principle applies wherever such compulsion casts an unreasonable burden upon a foreign corporation engaged in foreign or interstate commerce in any form and is not confined to obstruction of transportation of passengers or goods. Doubtless the power of the Congress of the United States "to regulate Commerce with foreign Nations, and among the several States" (U. S. Const., art. I, sec. 8, cl. 3) extends to foreign and interstate commerce of every kind and is not confined to transportation. Though a foreign corporation engaged in foreign or interstate commerce as carrier or otherwise is not "immune from the ordinary process of the courts of a State," yet no state may intrude upon the field assigned by the Constitution to the federal government. At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis v. Farmers Cooperative Equity Co.,* 262 U. S. 312, 316.) The principle upon which the petitioner relies is general; yet when that principle is invoked to support the contention

that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts "a serious and unreasonable burden" upon the corporation, a burden which unduly obstructs interstate commerce. It is significant that no case can be found where the general principle has led to the conclusion that the assertion of plenary jurisdiction by a state court in any transitory action against a foreign corporation is obnoxious to the commerce clause where such a foreign corporation has not been engaged in the business of a carrier. In every case beginning with *Davis v. Farmers Cooperative Equity Co. (supra)*, the court has based its decision upon the effect which compulsion upon a carrier to submit to suit upon causes of action arising in other states would have upon the business of a carrier in view of the nature of that business. (See *Matter of Baltimore Mail S. S. Co. v. Fawcett, supra,* and especially *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, and cases there cited.) The contention of the Banque de France finds little support in those cases.

We assume that Banque de France, *the central bank of issue* of France, does business and exercises functions connected with commerce with the United States and which tend to promote such commerce. Even upon that assumption the question here presented is not, as the petitioner contends, "Are the principles of immunity under the Commerce Clause which are applied in the decision of this Court in the case of *Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 389, and in the decisions of the United States Supreme Court therein followed, applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?" The question which must be decided upon this appeal is whether under the principles of immunity under the commerce clause (U. S. Const. art. I, sec. 8), applied in the case of *Matter of Baltimore S. S. Co.* v. *Fawcett* (*supra*), the exercise of jurisdiction by the Supreme Court

of the state in *this* suit which *these* plaintiffs have attempted to bring against *this* defendant in accordance with the laws of this state, is obnoxious to the commerce clause.

The test which dictates a negative answer in this case has been authoritatively stated by the Supreme Court of the United States. "Even a foreign corporation is not immune from the ordinary processes of the courts of a State where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened." (*Hoffman* v. *Foraker*, 274 U. S. 21, 23.) In the cases upon which the petitioners rely the courts gave weight to the disruption in the performance by interstate carriers of their function of transportation which might follow from the application and enforcement of the law of a state which would compel foreign corporations to submit to suit there in a case where the foreign corporation is an interstate carrier engaged in business in that state only incidentally connected with its business as a carrier in other states, where the cause of action arose outside of the jurisdiction in favor of a person not then a resident of the state and where "the suit might more conveniently be litigated in another forum available equally to both parties." (Cf. *B. & O. R. R.* v. *Kepner*, 314 U. S. 44, decided by the Supreme Court of the United States November 10, 1941.)

In this case the opposing considerations to be weighed are quite different. Banque de France customarily maintains here large balances which it uses in the course of its business. It has sent here gold of the value of hundreds of millions of dollars. It alleges that the accounts here upon which the plaintiff has levied are worth over seven hundred million dollars. If we sustain its contention that its property here is immune from process of the courts of this state in an action brought here by persons claiming to be assignees of the foreign owner of a cause of action for conversion of gold in France or for breach of contract made in either France or Belgium, these plaintiffs, though residents of this state, must resort to the courts in Belgium or

in Paris, jurisdictions occupied by Germany, a power with which this country is at war, or at best to the courts in unoccupied France, a country which accepts as law the decrees of the group of men who claim under the aegis of Germany to be authorized to act as the government of Belgium, though the United States recognizes as the only legitimate government of Belgium the group of exiles who are exercising in a country not subject to the domination of Belgium's conquerors governmental power entrusted to them by the laws of Belgium. To relegate the plaintiffs, though residents of New York, to the courts of a country which refused to recognize the government of Belgium or to enforce decrees upon which the title of the plaintiffs depends is, in effect, to deny to them any right to litigate in any tribunal their rights under the laws of Belgium as promulgated by its legitimate government.

Nothing that we have said should be construed as indicating that in our opinion the plaintiffs' assignment is valid in fact or in law or that the plaintiffs are entitled to recover if they prove all the allegations of the complaint. These are matters which must be determined by the court in which the action is brought and which we may not consider upon this appeal. We decide only that the defendant is not immune from suit in the courts of this state; and that the assertion of jurisdiction in this case by the courts of this state tends to promote "orderly, effective administration of justice" and casts no undue burden upon the performance by the defendant of any function in interstate commerce which may be incidental to its banking business.

The order should be affirmed, with costs.

Loughran, Finch, Rippey, Lewis, Conway and Desmond, JJ. concur.

Order affirmed.

FILED
APR 17 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Appellant,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

JOHN FOSTER DULLES,
JOHN C. BRUTON,
Counsel for Appellees.

SULLIVAN & CROMWELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

IN THE MATTER OF THE APPLICATION OF BANQUE DE FRANCE,

Petitioner-Appellant,

For An Order of Restraint

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THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRY WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

STATEMENT BY APPELLEES OF GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ASSERTED BY THE APPELLANT, PURSUANT TO RULE 12.

Pursuant to United States Supreme Court Rule 12, paragraph 3, the above named appellees present this, their statement, disclosing the matter or ground making against the jurisdiction of the Supreme Court of the United States

to review on appeal the judgment appealed from herein as follows:

I. The statute of the state, which is involved in this action, is Section 224 of the General Corporation Law of the State of New York (§ 224, L. 1909, ch. 28) which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

II. The Court of Appeals of the State of New York has construed the above quoted statute to be inapplicable where the maintenance of an action thereunder imposes an undue and unreasonable burden upon interstate or foreign commerce. *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379 (certiorari denied, 298 U. S. 675). In that case it was held that an action could not be maintained by a resident of the State of New York (who, however, was not a resident when the cause of action arose) against a foreign corporation where the maintenance of the action would impose an undue and unreasonable burden upon interstate commerce.

In the instant case, therefore, the Court of Appeals was not, and the Supreme Court of the United States will not be, called upon to pass upon the validity of the New York State statute. The Court of Appeals was merely called upon to apply the New York State statute as interpreted by it in the *Fawcett* case, *supra*, and to see if its application to the appellant here would impose an undue and unreasonable burden upon interstate or foreign commerce. The Court held that application of this statute to the facts of the appellant would not impose an undue and unreasonable burden upon interstate or foreign commerce. The Supreme Court of the United States will not in this appeal be called upon to pass upon the validity of the New York State statute; it will merely be called upon to apply the statute as

construed by the Court of Appeals in *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379, to the appellant in this case.

III. The questions presented upon this appeal are not as stated in paragraph V of the appellant's jurisdictional statement. The question is solely whether the application of the New York State statute, as construed by the Court of Appeals in the *Fawcett* case, *supra*, to this appellant would impose an undue and unreasonable burden upon interstate or foreign commerce in violation of Article 1, Section 8, clause 3, of the United States Constitution. The appellant is appealing under Section 237 (a), as amended, of the Judicial Code (Section 344, Title 28, of the United States Code Annotated). Under this section the Supreme Court of the United States does not have direct appeals jurisdiction where a State statute has merely been misapplied. Such a case can only be reviewed by the United States Supreme Court where the Court in its discretion, upon petition for a writ of certiorari, directs the review.

If the jurisdiction of the Supreme Court of the United States depended upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional, the Court would be deluged with appeals. Mr. Justice Brandeis, in his dissenting opinion in the case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 298, said:

> "If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved but upon the skill of counsel."

Whether a statute is valid depends on the *power* of the State to enact it. In the case of *Baltimore and Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the Court said at 224:

> "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

IV. This appeal does not present a question of law which will determine the rights of other litigants. It presents only a question of fact as to whether *this* appellant is so situated that the assumption of jurisdiction by the New York State courts over it, would impose an undue and unreasonable burden upon interstate and foreign commerce. The Court of Appeals of the State of New York said in its opinion in this case:

> "* * * the question here presented is not, as the petitioner contends, 'Are the principles of immunity under the Commerce Clause which are applied in the decision of this Court in the case of *Baltimore Mail S. S. Co. v. Fawcett*, 269 N. Y. 389, and in the decisions of the United States Supreme Court therein followed, applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?' The question which must be decided upon this appeal is whether under the principles of immunity under the commerce clause (U. S. Const., art. I, sec. 8), applied in the case of *Matter of Baltimore S. S. Co. v. Fawcett* (*supra*), the exercise of jurisdiction by the Supreme Court of the state in *this* suit which *these* plaintiffs have attempted to bring against *this* defendant in accordance with the laws of this state, is obnoxious to the commerce clause."

A decision on this question by the Supreme Court of the United States either on appeal or on certiorari would not determine any principle applicable to other cases. It would decide merely that the appellant could or could not be sued in the State Court of New York, and such a determination would depend upon whether assertion of jurisdiction over the appellant by the New York State Courts would impose

an undue and unreasonable burden upon foreign commerce. This question of fact would again have to be decided by this court whenever the question was put in issue by a party to an action.

The question of course is of no public importance or interest. The Supreme Court of the United States therefore does not have jurisdiction on a direct appeal and should not assume jurisdiction on a petition for a writ of certiorari.

V. For the reasons we have stated, the appeal herein is frivolous and does not raise a substantial Federal question.

VI. The jurisdictional statement of the appellant was not submitted to the Presiding Judge of the State Court allowing the appeal, directly contrary to Rule 12, paragraph 1, and Rule 46, paragraph 2, of the Rules of the Supreme Court of the United States. The appeal herein was allowed by the Presiding Judge of the Court of Appeals on March 7, 1942. The jurisdictional statement was not presented to him until March 24, 1942, whereupon he allowed it to be filed. The jurisdictional statement was not served by the appellant upon the appellees until March 25, 1942, or 18 days after the appeal was allowed, contrary to paragraph 2 of Rule 12 of the Supreme Court of the United States.

VII. The Supreme Court of the United States as recently as November, 1941, in *Baltimore & Ohio Railroad Co.* v. *Kepner,* 86 L. Ed. 37, expressed views directly opposed to the appellant's contention in this appeal.

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Appellant,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN SUPPORT OF ITS JURISDICTIONAL STATEMENT AND IN OPPOSITION TO STATEMENT OPPOSING JURISDICTION.

FREDERIC R. COUDERT,
MAHLON B. DOING,
LEWIS A. R. INNERARITY,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

IN THE MATTER OF THE APPLICATION OF

BANQUE DE FRANCE,

Petitioner-Appellant,

For an Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRI WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

BRIEF OF APPELLANT IN SUPPORT OF ITS JURISDICTIONAL STATEMENT AND IN OPPOSITION TO APPELLEES' STATEMENT AGAINST JURISDICTION.

Appellees' objections herein to the jurisdiction of this Court upon appeal, as well as to the granting of certiorari, do not lend themselves readily to simple analysis. How-

ever, we believe that the statement of the two following points fairly embraces all of appellees' objections in both respects:

1. That the question here presented is not one as to the validity of the New York statute, but is a frivolous non-Federal question as to whether or not the New York statute has been misapplied to the particular facts in this case.

2. That the question presented is of no public importance or interest, and its determination by this Court will not establish the rights of other litigants.

We shall reply to these objections in order.

I.

Appellees concede that the State statute which is involved in this proceeding is Section 224 of the General Corporation Law of the State of New York (Section 224, L. 1909, ch. 28), which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action." (Appellees' statement, p. 2.)

Independently of any concession by appellant, however, it is clear that the decision of the Court of Appeals of the State of New York herein held that section of the General Corporation Law to be valid against our contention that, in its application to the situation at bar, the statute violates the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3 thereof. In this regard, the opinion herein of Chief Judge Lehman of the New York Court of Appeals states:

> "The Appellate Division, upon motion of the respondents, dismissed the petition of Banque de France 'as matter of law and not in the exercise of discretion.'

> The petitioner seeks an extraordinary remedy to halt threatened action by a court or judge which the petitioner contends would be a usurpation of power. The General Corporation Law (Cons. Laws, ch. 23) provides that 'an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action.' (Sec. 224)."
>
> • • • • • • •
>
> "At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis v. Farmers Cooperative Equity Co.*, 262 U. S. 312, 316.) The principle upon which the petitioner relies is general; yest when that principle is invoked to support the contention that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts a 'serious and unreasonable burden' upon the corporation, a burden which unduly obstructs interstate commerce."
>
> (Transcript of Record, pp. 158, 159-160.)

Based apparently upon this statement of the determining test by the Court of Appeals, appellees urge that the question here involved is one merely as to the misapplication of the New York statute, and does not involve a decision as to the validity of the statute. They then urge that such a question of misapplication can only be reviewed by this Court upon petition for a writ of certiorari and not upon appeal, because they say that the jurisdiction of this Court upon appeal cannot be predicated upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional.

The decision of the Court of Appeals in this case necessarily determined that Section 224 of the General Corpora-

tion Law of the State of New York is valid, over appellant's objection of unconstitutionality, as applied to this appellant and to the facts in this case.

The jurisdiction of the Supreme Court of the State of New York over foreign corporations is wholly statutory, and except for the provisions of Section 224 of the General Corporation Law, the Court would have no jurisdiction of the action which appellant, by this Special Proceeding, seeks to restrain. *Gregonis* v. *P. & R. Coal and Iron Co.*, 235 N. Y. 152, 158.

Nor is the question one of the interpretation or construction of Section 224 of the General Corporation Law of the State of New York, which is all-embracing in its application to actions by residents of the State against foreign corporations, including carriers engaged in interstate commerce, as to which it has been held to be unconstitutional under the Commerce Clause in *Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379; *N. Y. Brook, etc.* v. *Aluminum Co.*, 231 A. D. (N. Y.) 693; and *Ball* v. *Canadian Pacific Steamships, Ltd.*, 6 N. Y. Supp. (2d) 877, affirmed 276 N. Y. 650.

Consequently, it is clear that the determination in this proceeding by the Court of Appeals that the courts of the State of New York have jurisdiction over this appellant necessarily involves the determination that Section 224 of the General Corporation Law is valid against appellant's claim of its unconstitutionality.

The only problem, therefore, is to ascertain the soundness of appellees' contention that jurisdiction of this Court upon appeal cannot be founded

> "• • • upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional, • • •" (Appellees' Statement, p. 3).

In the majaority opinion in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, upon the dissenting opinion in which appellees rely, the governing rule is thus stated:

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144; *McCullough v. Virginia*, 172 U. S. 102, 116-117; *General Oil Co. v. Crain*, 209 U. S. 211, 228; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. And see *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 3, 27. The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter v. Greenhow*, 114 U. S. 270, 295; *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co. v. Anderson*, 233 U. S. 325. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Yazoo & Mississippi Valley R. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217; *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 576. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be

> on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put." (pp. 288-289.)

That rule has been frequently since restated by this Court, in decisions in which Mr. Justice Brandeis concurred, so that it must be concluded either that his dissent in the *Dahnke-Walker* case was founded upon a different principle or that he subsequently found himself to be in concurrence with the majority opinion in that case.

In *Fiske* v. *Kansas*, 274 U. S. 380, in a unanimous opinion of this Court, the rule is thus restated:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow v. Krinsky*, 259 U. S. 503, 510; *Cudahy Co. v. Parramore*, 263 U. S. 418, 422. And see *St. Louis, &c., Railway v. Wayne*, 224 U. S. 354, 359." (p. 385.)

Also, in *Cudahy Co.* v. *Parramore*, 263 U. S. 418, this Court held:

> "Defendants in error have submitted a motion to dismiss the writ of error on the ground that no federal question is involved, but it is clearly without substance, and is overruled.
>
> That the statute is constitutional upon its face is established by previous decisions of this Court *(New York Central R. R. Co. v. White*, 243 U. S. 188; *Haw-*

kins v. Bleakly, Id. 210; *Mountain Timber Co. v. Washington,* Id. 219; *Arizona Employers' Liability Cases,* 250 U. S. 400; *Madera Co. v. Industrial Accident Commission,* 262 U. S. 499) and the only inquiry we need make is whether it is constitutional as applied and enforced in respect of the facts of the instant case. See *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 288-289." (p. 422.)

Moreover, from the recent decision of this Court in *Memphis Natural Gas Co.* v. *Beeler,* No. 499, October Term, 1941, decided March 30, 1942, it is clear that this rule applies in a situation wherein the validity of the State statute was either drawn in question or passed upon in the state court, or was deemed by the highest court of the state to be in issue. Obviously, all of these requirements as to jurisdiction upon appeal have been met in the situation at bar.

In the face of these authorities, the appellees' suggestion that the appeal is frivolous requires no comment.

II.

Conceding, *arguendo,* that there is merit in appellees' contention that this Court lacks jurisdiction upon appeal herein, and that this Court should view the order of Chief Judge Lehman allowing this appeal merely in the light of a petition for a writ of certiorari, there is no merit in the suggestion of appellees that the questions here presented are of no public importance or interest, and that their determination by this Court will not establish the rights of other litigants.

The question here presented is one of first impression.

The doctrine as to the immunity of a foreign corporation from suit in a forum foreign to any place in which it does business and foreign to the place where the cause of action arose in favor of a non-resident of the forum, had its origin

in the decision of this Court in *Davis* v. *Farmers Cooperative Equity Co.*, 262 U. S. 312 (1923), and was founded upon the conclusion that, in such a situation, an undue burden was imposed upon interstate or foreign commerce in contravention of the Commerce Clause of the Constitution.

Concededly, this doctrine has been applied heretofore only in favor of foreign corporations engaged in interstate or foreign commerce as carriers, although there has been no refusal by this Court, or any Court prior to the decision of the New York Court of Appeals in this proceeding, to apply the doctrine to other foreign corporations upon the ground that they were not engaged in the transportation of passengers or goods in such commerce.

Appellant contends that the doctrine should be applied not only to foreign corporations engaged in commerce as carriers, but to all foreign corporations engaged in interstate or foreign commerce in any of its phases. This contention presents a question of law which has never been passed upon by this Court, and which can only be finally determined by this Court, as it involves a constitutional question.

The two tests apparently postulated by the decision of the Court of Appeals herein as to the applicability of this doctrine of immunity to a particular state of facts, namely (a) the nature of the function which the foreign corporation defendant performs in foreign or interstate commerce; and (b) the existence of another forum available equally to both parties, may or may not be accepted as controlling by this Court. In any event, they have not yet been so accepted. Consequently, the failure of this Court to pass upon those tests must necessarily leave an important constitutional principle involved in uncertainty.

Moreover, a clarification of the principles of immunity which shall be held ultimately to control in the case of corporate defendants engaged in interstate or foreign com-

merce must necessarily establish the rights of other litigants than appellant. Until there shall have been such a clarification by this Court, the rights of all litigants similarly situated will remain in doubt.

The action pending in the courts of New York, the further prosecution of which appellant seeks to restrain, is between the central banks of issue of Belgium and of France, and involves in excess of Two Hundred Twenty Eight Million Dollars. Appellees do not even pretend that the alleged assignment to them of the claim of Banque Nationale de Belgique was for any purpose other than an effort to give jurisdiction to the courts of the State of New York. Therefore, notwithstanding such alleged assignment, the real parties in interest to this litigation continue to be the central banks of issue of Belgium and of France.

The case of *Davis* v. *Farmers Cooperative Equity Co., supra,* was determined by this Court upon a writ of error. Numerous other decisions upon the question were made by this Court upon the granting of writs of certiorari, namely, *Denver Rio Grande R. R. Co.* v. *Terte,* 284 U. S. 284; *Atchison Railway Co.* v. *Wells,* 265 U. S. 101; *Michigan Central Railway Co.* v. *Dix,* 278 U. S. 492; and *International Milling Co.* v. *Columbia,* 292 U. S. 511. At least one of those cases could also have been brought to this Court upon direct appeal, that of *Atchison Railway Co.* v. *Wells, supra.*

We are not aware of any case in which this Court has refused to review a decision wherein the State Court had applied new tests, which this Court had not already laid down, for the determination of the existence of this constitutional immunity.

Conclusion.

We respectfully submit that the jurisdiction of this Court upon appeal in this proceeding is clear. If, however, this Court should be of the opinion that it does not have juris-

diction herein upon direct appeal, then we respectfully request the Court to regard and act upon the papers whereon the appeal was allowed, including the jurisdictional statement filed herein, as a petition for certiorari, pursuant to § 237 (c) Judicial Code, and that such petition be granted.

Respectfully submitted this 21st day of April, 1942.

FREDERIC R. COUDERT,
MAHLON B. DOING,
LEWIS A. R. INNERARITY,
Counsel for Appellant,
2 Rector Street,
New York City.